

## A GENERATION OF BETRAYAL?

Bruce Ackerman\*

FOR most judges, the basic unit of the Constitution is The Clause; for most law professors, the basic unit is The Theory, the one that lurks behind the Clauses and the cases, and puts them in their best light.

For me, the basic unit is The Generation. Constitutional meaning is not primarily created by judges out of texts but emerges in the course of the struggle by ordinary Americans to hammer out fundamental political understandings. This struggle is not fueled by the intellectual curiosity of a juristic elite, but by crucial historical events which provoke popular efforts to modify, sometimes radically, preexisting starting points: the war for independence or the war between the states or the struggle between capital and labor or the struggle against Nazism and Communism or the struggle for racial equality or . . . .

There is no need for a single coherent problematic to dominate; a movement might successfully force a conflicting set of issues onto the center of the nation's political consciousness. If we look around us today, political energy seems clustered around a movement that simultaneously seeks to dismantle the welfare state while supporting new forms of state intervention in the moral sphere, using the abortion issue as an entering wedge. This double-edged effort may (or may not) be conceptually at war with itself, but the dominance of a constitutional agenda does not depend on its coherence. It depends on the capacity of a political movement to impress its diagnosis of "the public and its problems" on the on-going debate. There are periods in which rival and incompatible diagnoses struggle for supremacy in the public mind. But there are also periods in which a particular problematic comes to dominate serious political debate and decision, despite angry protests from interests and ideologies that have been pushed to the periphery.

A *constitutional moment* occurs when a rising political movement succeeds in placing a new problematic at the center of American political life. Such a decisive transformation in the operational agenda is both a rare and important event. But it should not be confused with the rise of a new *constitutional solution*. Once Americans begin to focus on the rising agenda, they may not find any solution that meets

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\* Sterling Professor of Law & Political Science, Yale University. This is a revised and expanded version of the McCorkle Lecture, presented at the University of Virginia in October, 1996. My friends at Fordham prevailed upon me to attempt a trial run at their September symposium, and given the thoughtful written commentaries my talk generated, it seems most appropriate to publish the Lecture here. But I am also very grateful to the Virginia faculty for their kind reception and cogent criticisms, to which I have tried to respond in this final draft.

with their sustained and considered support. Provisional legislative efforts to deal with emerging problems generate a meaningless cycle as each set of election returns brings a new fad to the fore.

Worse yet, each generation finds itself in a race against time in hammering out a stable solution to the dominant problematic. The ultimate limit is set by mortality. The movers-and-shakers of one generation begin to die, as do their countless followers; the effort to sustain the movement's intensity encounters familiar Weberian difficulties as activists find that they cannot live by zeal alone. Even within a single life-span, a generation's problematic may be pushed aside by some overwhelming event; or by the persistent demand of a younger cohort for a new agenda; or by a given generation's despair at its continuing failure to come up with a satisfactory solution. The result will be a *failed constitutional moment*, generating a sense of aching irresolution that may haunt the polity for a long time; the civic spirit may slowly wither after a series of such failures, as the effort of generation after generation to solve their common problems leads only to the accumulation of a mountain of unresolved grievances.

But happier outcomes are possible. After much toil and trouble, a political generation may find that it *can* hammer out a broadly acceptable solution to one or more of its outstanding problems. These victories in constitutional politics come in many sizes. Some of the time, a generation successfully resolves a relatively discrete problem in a way that does not profoundly destabilize a host of other well-established constitutional norms. The movement for women's suffrage can serve as a paradigm here: a long campaign that mobilizes millions of women, and also men, finally gains a primary place on the national agenda and then wins recognition in the enactment of the Nineteenth Amendment. This new *constitutional solution* marked an important change, but the women's movement that spearheaded it was demobilized by its own success and did not move on to challenge other inegalitarian features of the constitutional regime.

In contrast, some new solutions have had such broad impact on public values and organizational structures that they amount to a change in *constitutional regime*. Examples here are the Founding, Reconstruction, and New Deal.

Since my labels seem to be catching on, perhaps I should point to an important asymmetry in their conceptual structure. I understand the rise of a constitutional moment as a more-or-less discontinuous event. Of course, each successful moment is preceded by a long period during which movement-activists are hard at work developing their critique of the existing system and organizing their political forces. During this time, however, they compete on relatively equal terms with many rival movements. Moreover, most Americans may respond to this intense ideological competition with resolute indifference.

The result is a doughnut-shaped political system. The hole of the doughnut is inhabited by normal politicians who reflect the interests of most of their constituents by straddling ideological issues that challenge preexisting constitutional understandings and who focus on the more concrete business of bringing material benefits home to their constituents.

The ring of the doughnut is inhabited by a host of contending ideological groupings, each composed of would-be Leaders and too few Followers. Each group seeks to gain the critical mass of support needed to gain control of the center. A constitutional moment signifies that one or another grouping has managed to gain mass support for an invasion of the normally unideological center of American politics. Such a moment cannot occur without disrupting many political arrangements that have been shaped by normal politicians for quite different reasons. As a consequence, the rise of a constitutional moment tends to be a sudden affair—measured in years, not decades.

Similarly, I understand the failure of a constitutional moment as more or less of a yes/no affair: the defeat of Bryan and the Populists in 1896 and 1900 was clear and decisive despite the fact that, in the aftershock, some Populist themes managed to reemerge in the mix of normal politics; and the same is true of the defeat of McGovern and his Democrats in 1972. On these occasions, a movement has successfully penetrated the barriers of normal politics that normally block an appeal to the mobilized People, but the People respond by rejecting the movement's effort to mobilize support for a fundamental reworking of constitutional understandings.

In contrast, I understand the distinction between successful constitutional solutions and successful regime changes to involve differences in degree, not differences in kind. A new "regime" involves very big constitutional changes in public values and organizational structures, but a new "solution" yields somewhat smaller changes. For example, does our last successful enterprise in constitutional politics, the Civil Rights Revolution, inaugurate a new regime or simply a new solution to an important, but relatively discrete, problem?

Maybe something in between.

This is not an answer I am so willing to tolerate at the prior stages of the analysis, for a very simple reason. When we inquire into the existence of a constitutional moment or its subsequent failure, we are asking whether the language of popular sovereignty is constitutionally appropriate to describe the events, or whether we should view the political outcomes as expressive of the normal doughnut-shaped structure of representative government in the United States. Because I believe that the language of popular sovereignty is sometimes, but not often, the appropriate constitutional description, the concepts of moment and failure function to set threshold conditions. In contrast, once it is determined that a generation has successfully generated the

kind of mobilized and considered support for a constitutional innovation, the scale of the innovation is up to the People themselves. If they affirm the need for a sweeping regime change, it is the task of the legal order to do justice to this demand; if the People insist on an important mid-course correction, then this too should be the order of the day; and if something in-between, then something in-between.

I do not want to belittle the importance and delicacy of such questions. But this essay focuses on the prior problem. I want to focus on the Roosevelt years and ask whether the language of popular sovereignty provides an appropriate description for the constitutional transformations achieved during this period. In my lingo, while these years rather obviously involved the rise of a new diagnosis of the central problems facing Americans, did the popular struggle over the new agenda merely lead to a failed constitutional moment? Or should constitutional lawyers recognize that Americans of this era hammered new fundamental commitments which we today have a constitutional obligation to honor?

On one level, this seems an odd question. This is the level I call the living constitution, which is derived by analyzing the contemporary discourse in the spirit of a cultural anthropologist attempting a thick description of the powerful symbols used in courts and other places where constitutional law is spoken in America.<sup>1</sup> Curiously, this anthropological inquiry has not excited much interest from the professionals;<sup>2</sup> but if they ever launched an expedition to the tribe of constitutional lawyers, they would trace many of the most potent symbols in our existing culture to the Roosevelt era. Judges still shudder at the name of *Lochner*;<sup>3</sup> they still do homage to the spirit of the great dissenters Brandeis and Holmes while avoiding intimate association with Justices Peckham and McReynolds. With the exception of that judicial revolutionary, Clarence Thomas,<sup>4</sup> the modern Court is entirely unprepared to launch a frontal assault on the ringing constitutional affirmation of the national welfare state by the Supreme Court in *Darby*<sup>5</sup> and *Wickard*.<sup>6</sup>

Turning away from the courts, our anthropologist would confront scholars anxiously pondering the "countermajoritarian difficulty" that first became a central doctrinal dilemma with the *Carolene Products*

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1. Clifford Geertz, *The Interpretation of Cultures* 3-32 (1973).

2. Interesting anthropological essays include Clifford Geertz, *Local Knowledge* (1983), and Lawrence Rosen, *The Anthropology of Justice* (1989), but these works do not focus on American constitutional law.

3. *Lochner v. New York*, 198 U.S. 45 (1905).

4. See *United States v. Lopez*, 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring).

5. *United States v. Darby*, 312 U.S. 100 (1941).

6. *Wickard v. Filburn*, 317 U.S. 111 (1942).

decision of 1938.<sup>7</sup> And he would find that politicians are much more prone to accept the legitimacy of decisions like *Reynolds v. Sims*<sup>8</sup> (and even *Buckley v. Valeo*!<sup>9</sup>) that can be rationalized in *Carolene* terms than they do when encountering decisions, like *Roe*,<sup>10</sup> where the ghost of *Lochner* haunts.

The staying power of these Rooseveltian symbols belies the textualist's confidence in canonical formulae as the supreme form of constitutional meaning, and is testimony of the remarkable capacity of our constitutional tradition to memorialize the achievements of what was, after all, by far the most popular constitutional movement in American history. While Madison and Bingham have won a place in the constitutional conversation as leading spokesmen for We the People, these worthies never dreamt of obtaining the deep and considered support that the New Deal won from every region and class—not once but time after time through the 1930s and the 1940s. Given its unprecedented popular support,<sup>11</sup> it should be no surprise that the Roosevelt Revolution has had such great success in sustaining itself for sixty years.

And yet it doesn't take a great prophet to predict distinctive challenges in the decade ahead. Simply reflect on the more obvious implications of mortality. Especially in the aftermath of a regime change, the departing generation has used its overwhelming position in the courts and the classrooms to repeat and repeat the lessons it has learned from its great victories. But slowly, and then with grim speed, these voices fall silent. We reach a point at which it is for us, the living, to say what all of their sound and fury amounted to.

Who was Franklin Roosevelt? Who was Martin Luther King? These two questions have different resonances. The generation now dominant in the citadels of power and learning confronted King as part of its own engagement with the constitutional politics of the

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7. *United States v. Carolene Prods., Co.*, 304 U.S. 144 (1938). This assertion is not refuted by the fact that the intellectual origins of the "difficulty" can be traced back as far as Thayer's famous essay of 1893 (but no further!). See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). As I have already suggested, all successful constitutional moments are preceded by a long period during which leading ideas and organizations are developed somewhere in the doughnut that surrounds a generation's central political structures and reigning constitutional ideals. But it is one thing for an idea to be entertained by some *soi disant* Progressive intellectuals; quite another for it to serve as the centerpiece of an entire generation's doctrinal development.

8. 377 U.S. 533 (1964).

9. 424 U.S. 1 (1976).

10. *Roe v. Wade*, 410 U.S. 113 (1973).

11. In the aftermath of the 1936 elections, only 16 Republican Senators and 88 Republican Representatives remained on Capitol Hill to contest the New Deal's revolutionary redefinition of the aims and structure of American government. See William Leuchtenburg, *The Election of 1936*, in 3 *History of American Presidential Elections: 1789-1968*, at 2842-43 (Arthur M. Schlesinger, Jr. ed., 1971). Nothing like this has occurred in American history.

1960s: each of us had to decide whether King was a hero or a villain or something-in-between. As the next generation comes to political maturity, we react with bemused anxiety when they don't seem to know the meaning of King's life and death. We make emphatic efforts to drum our own judgments into the vacant heads of our negligent and ignorant—not to say skeptical—children. We convert our lived experience into the next generation's monuments in our history books and statute books, songs and public holidays.

This anxious time is now past for the generation that fought the good fight over Franklin Roosevelt. The millions who will soon flock to the Roosevelt monument on the mall in Washington, D.C. never engaged in the passionate arguments raised by the constitutional movement led by “that man in the White House.” On entering the new monument, children will ask whether Roosevelt lived before or after Lincoln, and parents may pause before they answer. How strange this must seem to men like Bob Dole and Ronald Reagan, whose formative experiences harken back to that now distant time.

For the rest of us, the constitutional meaning of the New Deal must now be mediated by the printed page, and is available only to those who pause to look at the yellowing documents and tell their story to others. The question is squarely put: Shall we the living incorporate the New Deal era into the conversation between generations that constitutes constitutional law, or shall we decide to treat the era of Roosevelt with the same ignorant contempt with which we deal, say, with the Presidency of James Knox Polk?

I call this the question of reception, to suggest an analogy to the struggle of an earlier generation over whether American courts should “receive” the English common law. During the early days of the Republic, “England” was becoming the name of a foreign country, but it was unclear whether it was still close enough to “America” to serve as a baseline for the further development of our own legal tradition. The answer, after much struggle, was in the affirmative.<sup>12</sup> The common law tradition became ours as well as theirs.

This is the same exercise we now confront in our constitutional self-understanding. The past becomes another country when it departs from the memory of the living, and depends on the self-conscious interpretive decisions of a new generation. As with the English common law, we confront the question of reception of the constitutional law of a “Roosevelt era” that, for the first time, can be sealed with a set of quotation marks.

This is a daunting prospect, but not one unknown to our constitutional experience. The death of the generations that gave us the Constitution of 1787 and the Reconstruction Amendments are associated with similar acts of generational detachment, agonizing reappraisal,

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12. See Charles M. Cook, *The American Codification Movement* (1981).

and fundamental reassessment. The nation shuddered on that dread day fifty years after the Declaration of Independence when both John Adams and Thomas Jefferson died on July 4, 1826. As the very last members of the Founding generation went to their graves in the 1850s, the Supreme Court was desperately reinterpreting their achievement in that monument to originalism, *Scott v. Sandford*.<sup>13</sup>

A similar cycle recurs after Reconstruction—from the moment when Charles Sumner's body was decked out in mourning on Capitol Hill in 1874 to the day when that last great Civil Warrior, Oliver Wendell Holmes, toddled out of the Supreme Court in 1931. As in the case of *Dred Scott* and the Founding, the passage of seventy years had not been kind to the great legal memorials of Reconstruction. Just as Jefferson and Adams would have wept at the sight of Taney's opinion, Sumner and Bingham would have been appalled by the reigning interpretation of the Reconstruction Amendments in political life, in history books, and in the constitutional law of the 1920s. More appalling still, neither the generation of Jefferson nor that of Sumner could escape their own responsibility in the affair, and act as if their own historic contributions had no relationship to their latter-day interpretation. The fate of the Founding or Reconstruction at the hands of its successors does not involve a total misunderstanding; the tragedy lies in the kind of interpretive linkage these generations constructed with their predecessors' achievements—one that allowed them to belittle, without altogether denying, their predecessors' strivings for a more perfect Union.

The legal monuments of the Roosevelt era have not suffered such humiliating historical ironies. Even today, and despite the more recent Civil Rights Revolution, lawyers do not worship at the shrine that the Reconstruction Republicans intended to serve as their greatest constitutional monument—the Fourteenth Amendment's solemn guarantee against an abridgment of the "privileges or immunities" of American citizenship. Indeed, most of our leading lawyers and judges will go to their graves without giving these majestic words an hour's thought. In contrast, many of the leading constitutional symbols from the Roosevelt era continue to travel in much the same orbits in which they were launched in the late 1930s and early 1940s. To be sure, a lot of epicycles would be required to account for the emergence of later symbolic centers exerting tremendous gravitational force in their own right—most notably *Brown v. Board of Education*<sup>14</sup> which pushed a new jurisprudence of equality to the fore in ways the New Deal did not anticipate. Nonetheless, the living constitution of 1997 stands closer to the original understandings of the Roosevelt era than, say,

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13. 60 U.S. (19 How.) 393 (1856).

14. 347 U.S. 483 (1954).

the living constitution of 1928 stood to the original understandings of 1868. And if you will allow the further comparison of incommensurables, I would say that the relationship between 1997 and 1936 is probably closer than the relationship between the living constitution of 1847 and the intentions of the Federalists of 1787.

Despite the Roosevelt era's triumph over time, the remorseless logic of generational passage is visible everywhere. On the political stage, President Clinton has just betrayed his liberal followers by consenting to the public effacement of a first great New Deal monument. In the name of a "new" Democratic Party, he has consented to the repeal of the Nation's commitment to all of America's children to hear their call for assistance in their hour of need.<sup>15</sup>

But I am here more interested in similar stirrings within the legal arena. Consider my debate with Larry Tribe over the constitutionality of NAFTA,<sup>16</sup> which was approved by the Senate by a vote of 61-38. If NAFTA had been called a treaty, it would have been defeated under the 1787 Constitution's two-thirds rule; but thanks to a remarkable innovation of the Roosevelt era, NAFTA's proponents had another option. They could call NAFTA a Congressional-Executive Agreement, and win its validation by gaining the approval of simple majorities in both Houses, rather than two-thirds of the Senate. It was this fundamental change in the rule of recognition that allowed constitutional lawyers to inform the world that Ross Perot, and not Bill Clinton, had lost this particular struggle over the future of American foreign policy.

But was this constitutional creation of the Roosevelt era itself legitimate? After considering my arguments, my friend Tribe has concluded that they are insufficient to justify the New Deal innovation, and that NAFTA is unconstitutional. Of course, I think I am right and he is wrong, but the very fact that he disagrees is enough to make my point. After all, even Ross Perot and Pat Buchanan think that NAFTA is now part of the law; how could one of the leading constitutional lawyers of our generation come up with such a seemingly aberrational view?

Because unlike most of us, he has begun the difficult task of detaching himself from the New Deal stories he learned in law school and is attempting to make an independent judgment on the nature and significance of the preceding generation's constitutional contribution. Nor will it be easy for lawyers and judges and presidents and congressmen to dismiss this particular debate as the academic equivalent of the Harvard-Yale game. With the future of the economic organization of

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15. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

16. Compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* (1995) with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995).



North (and South) America at stake, perhaps even Harry Edwards<sup>17</sup> might be willing to listen for a moment and join the development of a professional consensus that will—in one way or another—bring the contemporary status of the Roosevelt Revolution into bolder relief.

As will any number of other matters, like the Supreme Court's decisions in *Lopez*<sup>18</sup> and *Seminole Tribe*.<sup>19</sup> I do not want to make too much of these decisions, which may not have much staying power after a few more Clintonian appointments. But whether or not *Lopez* and *Seminole Tribe* go the way of *National League of Cities*,<sup>20</sup> they will spark a serious debate on the Roosevelt generation's decision to transform the federal government into a national government.<sup>21</sup>

Perhaps I am kidding myself, but the debate on another aspect of the Roosevelt Revolution seems a bit less advanced. While Richard Epstein has gained a great deal of notoriety with his enthusiastic embrace of *Lochner*,<sup>22</sup> I sense a lot of hesitation amongst academics and judges to admit his views into the mainstream of constitutional argument. But time will tell. Here too the fact of collective mortality has opened up a new space for the living to debate the meaning of *Lochner* with an open mind and an intellectual freedom that would shock the likes of Paul Freund and John Harlan or even Robert Bork and William Rehnquist.

On what basis, then, should the increasingly self-conscious debate over the reception of the New Deal proceed?

Let me prepare the ground with a couple of problems. In 1945, the House of Representatives passed a constitutional amendment which would have changed the treaty clause to authorize approval of international agreements by majorities in both Houses, in more or less the way that actually happened in the case of NAFTA.<sup>23</sup> Suppose that the Roosevelt/Truman Administration had responded by throwing its weight behind this amendment, pushing it through the Senate and carrying it forward to the country, ultimately winning the approval of three-fourths of the states. In this case, I am sure that Professor Tribe would have been happy to go along with my conclusion that NAFTA is constitutional. It is only because the Roosevelt/Truman Administration legitimated the Congressional-Executive Agreement by processes outside of Article Five that the Professor has his doubts.

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17. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191 (1993); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992).

18. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

19. *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996).

20. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

21. See *infra* text accompanying notes 36-37.

22. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

23. See Ackerman & Golove, *supra* note 16, at 86, 89.

Similarly, suppose that Roosevelt had not pushed his court-packing plan in 1937, but had put the formidable forces of New Deal Democracy squarely behind the constitutional amendment proposed by Senator Logan and Representative Keller, granting Congress the power to legislate "for the general welfare."<sup>24</sup> On this scenario, even Justice Thomas would have recognized that *Lopez* and *Seminole Tribe* required an interpretive act that took into account the considered judgments of Americans of the twentieth, and not only the eighteenth, century.

The question, in short, is whether the reception debate will be structured by a formalist understanding that the only constitutional achievements the present generation is bound to notice are those monumentalized through the processes of Article Five. I have linked Professor Tribe with Justice Thomas to emphasize that this question transcends political lines. I hope you will try to answer it without looking too intently to your short-term political agenda. For I assure you that the answer that emerges from the forthcoming debate will shape countless issues in ways that none of us can readily imagine.

So begin with some fundamentals. It is no small thing to ignore the constitutional achievements of any generation of Americans, much less a generation like our parents' that successfully renewed and redefined America's democratic commitments during the darkest hours of the century. It is even more serious when this act of betrayal is contemplated by a generation like our own, which has conspicuously failed time and again to hammer out stable constitutional solutions that have won the mobilized consent of our fellow citizens. The New Left failed in the late 1960's; the New Right failed in the 1980's; and the selection of Bill Clinton, Bob Dole and Ross Perot as presidential candidates suggests that we are in for a lot more churning in the near future. Who does this generation of midgets suppose itself to be when it seriously considers discarding the contributions of Americans who actually accomplished something very great indeed in the annals of the Republic?

The question does not lose its point when we turn to the reason why Professor Tribe and Justice Thomas would ignore the contributions of the departing generation. Karl Llewellyn, the greatest American jurisprude of midcentury, taught us to distinguish the grand style from the formal style<sup>25</sup>—a lesson that Ronald Dworkin, the leading jurisprude of the present day, has continued to teach in his own way.<sup>26</sup>

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24. S.J. Res. 8, 75th Cong., 1st Sess. (1937) (resolution introduced by Senator Logan); H.R.J. Res. 316, 74th Cong., 1st Sess. (1935) (resolution introduced by Representative Keller). For an extensive discussion of the range of formal amendments proposed during the constitutional crisis, see Bruce Ackerman, *We the People: Transformations* (forthcoming 1997) (manuscript at ch. 11, on file with the *Fordham Law Review*) [hereinafter Ackerman, *Transformations*].

25. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960).

26. Ronald Dworkin, *Law's Empire* (1986).

What, then, to make of the fact that the *only* reason given by the Tribes and the Thomases is that the Roosevelt Administration, after a great deal of public debate and deliberation, refused to follow the path to constitutional change outlined by the Federalists in Article Five?

This single formalism threatens us with a terrible blindness. After living in the grand style for two generations, will American constitutional lawyers greet the millenium with a renewed embrace of a formalism worthy of Baron Parke himself.<sup>27</sup> Just as the judges of the nineteenth century self-righteously punished pleading mistakes by refusing to hear the petitioners' pleas for justice, will the rising barons of the twenty-first century refuse to hear the voice of an entire generation?

The new hyperformalism is worse than the old. At least Baron Parke had the decency to let his contemporaries know of his hyperformalist tendencies; and when he threw them out of court, they could often correct their formal mistakes and return to court. But it is a bit much to nonsuit an entire generation after they have left the constitutional field.

Especially when they did not reject Article Five in a fit of collective inadvertance. Here is Franklin Roosevelt defending his court-packing proposal in a Fireside Chat to the American people as the Senate Judiciary Committee began considering his court-packing proposal in early March:

Two groups oppose my plan on the ground that they favor a constitutional amendment. The first includes those who fundamentally object to social and economic legislation along modern lines. This is the same group who during the campaign last Fall tried to block the mandate of the people.

Now they are making a last stand. And the strategy of that last stand is to suggest the time-consuming process of amendment in order to kill off by delay the legislation demanded by the mandate.

To them I say: I do not think you will be able long to fool the American people as to your purposes.

The other group is composed of those who honestly believe the amendment process is the best and who would be willing to support a reasonable amendment if they could agree on one.

To them I say: we cannot rely on an amendment as the immediate or only answer to our present difficulties. When the time comes

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27. I can do no better than the lapidary summary of Parke's career provided by the Dictionary of National Biography:

His judgments, models of lucid statement and cogent reasoning, were always prepared with great care, and usually committed to writing. His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation.

15 The Dictionary of National Biography 226 (1921-22).

for action, you will find that many of those who pretend to support you will sabotage any constructive amendment which is proposed. Look at these strange bed-fellows of yours. When before have you found them really at your side in your fights for progress?

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.<sup>28</sup>

As these words suggest, the debate surrounding the court-packing plan was far more complex than is generally supposed. Since the Republicans had been overwhelmed by the political tidal wave of 1936, they did not seek to deny that the People were demanding a fundamental change in constitutional course. Instead, they responded to Presidential court-packing by joining forces with liberal Democrats led by Burton Wheeler who served as spokesman for the anti-Roosevelt coalition. Wheeler's critique focused on means not ends. He rejected Roosevelt's effort to constitutionalize his revolution by transforming the Court, and urged the President to follow the path laid out by the Federalists in Article Five. Here is the way Wheeler put the point in his radio address to the nation on February 19, 1937:

We have just taken part in an election in which the President of the United States carried 46 out of the 48 States; in 38 States, Democratic Governors were elected; and in 3 other States liberal Governors were elected. In view of this recent election, if the President of the United States would put his influence back of an amendment such as [I propose], it would be ratified in a very short time. Apparently there are those of the President's advisors who suggest that such a measure could not be enacted; and I say to them that if the recent election was not a mandate for social reform, as I believe it was, then it is time for all of us to find out who won the election. . . .

. . . .  
. . . I am for a liberal Constitution, I recognize that the instrument is the fundamental expression of the people's will. . . . I am ready for the amendment to the Constitution, and I believe the people of this country are ready for such an amendment, but I want it to be amended by the people in the way they have provided and not by packing the Court to make it subservient to anyone's desires. . . . We must do right things in the right way. This is no strategy of delay; it is the strategy of the right, of permanence, of real and abiding relief.<sup>29</sup>

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28. *The Public Papers and Addresses of Franklin D. Roosevelt* 131-32 (Samuel I. Rosenman ed., vol. 1937) (1941).

29. Radio Address by Hon. Burton K. Wheeler, *The Supreme Court* 8 (Feb. 19, 1937) (transcript on file with the *Fordham Law Review*).

This was no ordinary debate. In the words of a leading scholar of the period, "[f]or five months, the mass media, Congress, and the president focused on little else. . . . [T]he Court has not since then surfaced so long and so prominently on the public agenda, even during the salad days of the Warren Court."<sup>30</sup> The Gallup Polls of the period confirm what thousands of mass meetings made obvious in any event—the gripping character of popular involvement. But for present purposes, I am not interested in the substance of the debate, but who killed it.

The smoking gun came out of the new Marble Palace on Capitol Hill that Americans had just built for their Justices. By announcing their switch in time, and upholding the National Labor Relations Act and the Social Security Act, the Court undercut the great debate raging around them. In making this point, I don't want to join the tired discussion surrounding the subjective motives of the Justices who made the switch. I am dealing with public meanings, not personal motives.<sup>31</sup> I do not really care why Hughes and Roberts departed so obviously from their opinions of the previous term to uphold the Labor and Social Security Acts. The crucial fact is that they joined in creating opinions of the Court that had an obvious public meaning to the other participants in the constitutional conversation then raging about them. So far as the President and the Congress and ordinary Americans were concerned, the public switch had a performative meaning<sup>32</sup> of transparent and high importance. Simply put, the Court's switch was broadly interpreted by all concerned as a symbolic acknowledgment of the People's voice and an indication from the Court that it was unnecessary for the President and Congress to contemplate more drastic actions to assure that the Justices would now cooperate in elaborating the constitutional principles of New Deal Democracy.

To see my point, imagine that the Court had—for one reason or another—continued down the path marked by its decisions of 1935 and 1936 to invalidate the Labor and Social Security Acts. On this scenario, one of three things would have happened. Either Roosevelt would have won Congressional support for his court-packing initiative, or, failing that, he would have joined Wheeler in a successful campaign for the enactment of Article Five amendments, or, failing

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30. See Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 Am. Pol. Sci. Rev. 1139, 1140, 1144 (1987).

31. Recent scholars too easily ignore this point by focusing on hypothetical scenarios which invite them to peripheralize the decisions actually handed down by the Court in 1935 and 1936. See Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891, 1935-74 (1994); Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 Fordham L. Rev. 105, 156-60 (1992). I discuss the cases at greater length in Ackerman, *Transformations*, *supra* note 24, chs. 11 & 12.

32. See J.L. Austin, *How to Do Things with Words* (2d ed. 1975).

that, the country would have found itself in the midst of a continuing constitutional crisis at the time of Pearl Harbor. If scenario two had been realized, the New Deal Revolution would have monumentalized itself in terms that would have satisfied Justice Thomas of the need to recognize that the People, speaking through the political branches, were demanding that the Court recognize and elaborate the emergent principles of New Deal Democracy. Maybe scenario one would have sufficed to satisfy the Justice's cognitive needs. But this gain in monumental clarity is quite a price to pay for the risk of scenario three.

Moreover, it is a mistake to interpret the Senate's defeat of court-packing *after the switch* as a repudiation of the larger idea of constitutionalization through transformative judicial appointments and opinions. Certainly, the famous Senate Report of the Judiciary Committee rejecting Court-packing did not go so far:

Even if every charge brought against the so-called 'reactionary' members of this Court be true, it is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members. Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands.<sup>33</sup>

And when a steady stream of vacancies allowed Roosevelt to reconstitute the Court in his second and third terms, the growing number of conservatives in the Senate did not seek to use their growing power to challenge the President's authority to make a steady stream of transformative appointments.<sup>34</sup>

The importance of this emerging constitutional system of Presidential leadership through transformative appointments was visible to all. Here is Wendell Willkie explaining it to the readers of the *Saturday Evening Post* in the course of his successful campaign for the Republican Presidential nomination of 1940:

Mr. Roosevelt has won. The court is now his. . . .

In order to understand what this means, it is necessary to be clear concerning the nature of law itself. The full import of the law is not to be found in written enactments or constitutional provisions and amendments. These are parts of the skeleton, but the body of law is progressively built—with occasional interruptions and diversions—by deciding each case upon precedents furnished by prior decisions

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. . . [W]hen a series of reinterpretations overturning well-argued precedents are made in a brief time by a newly appointed group of judges, all tending to indicate the same basic disagreement with the

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33. Senate Comm. on the Judiciary, *Reorganization of the Federal Judiciary*, S. Rep. No. 711, 75th Cong., 1st Sess. 14 (1937).

34. See Ackerman, *Transformations*, *supra* note 24, ch. 12.

established conception of government, the thoughtful observer can only conclude that something revolutionary is going on. And that is what has happened here. . . .

. . . .

These decisions have made the United States a national and no longer a Federal Government. . . .<sup>35</sup>

When Willkie wrote these words, the New Deal transformation of the higher lawmaking system was not yet irreversible. Indeed, if the Republican candidate had defeated Roosevelt's unprecedented bid for a third term, the Supreme Court might never have written the ringing affirmations of New Deal constitutionalism in cases like *Darby* and *Wickard*. After all, Justices Hughes and McReynolds still remained on the Court in 1940, and President Willkie might have used his Presidential powers to persuade the Senate that the Roosevelt Court was now badly out of balance and that he should be given the authority to fill the vacancies with Justices who would have continued the tradition of laissez-faire constitutionalism into the new era.

But once Roosevelt had beaten Willkie, this option was cut off, and a now-unanimous Court proceeded to codify the New Deal Revolution with new authority. In *Darby*, for example, Justice Stone picked up the constitutional conversation where Willkie left it in the 1940 election, redeeming his warning that the Supreme Court was nationalizing the federal government. According to Stone, the Tenth Amendment "states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory . . . ."<sup>36</sup> Similarly, Stone wasted only a single paragraph dismissing any residual notion that the Due Process Clause might restrict the government's power to regulate the "free market" bargains between workers and their bosses. *Lochner's* contrary holding was not so much as cited, much less discussed, while other great landmarks of the period of Republican ascendancy were overruled with something approaching contempt.<sup>37</sup>

In making these moves, Stone's opinion for the Court no longer generated even a single dissenting vote. The significance of unanimity cannot be underestimated. Even when one or two Justices are willing to elaborate a doctrinal tradition, its principles remain a vital part of the living constitution. The constant stream of dissents not only testify to the continuing relevance of the critical tradition. Practicing lawyers will continue to study the opinions with painstaking care—if only because dissenters vote and may make a difference when splits in the

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35. Wendell L. Willkie, *The Court Is Now His*, Saturday Evening Post, Mar. 9, 1940, at 29, 71, 74.

36. *United States v. Darby*, 312 U.S. 100, 124 (1941).

37. *Id.* at 116, 123. I discuss *Darby*, and the larger process of the judicial creation of New Deal constitutionalism, at greater length in Ackerman, *Transformations*, *supra* note 24, ch. 12.

majority ranks appear. Over the long haul, the dissenters may have a larger impact. Their on-going critique may subtly influence the opinions expressed by the dominant majority. No less important, they will serve as a priceless resource should a new President come into office responsive to the constitutional values the dissenting tradition emphasizes. If he convinces the Senate to support his nominations to the Supreme Court, the new appointments can reinforce a living constitutional discourse, already containing a familiar and elaborate critique of the prevailing doctrine. Through a gradual process of evolutionary reinterpretation, the dissenting doctrine will then begin increasingly to shape the path of the law.

But the consistent and sustained support of the American People for the constitutional principles elaborated by New Deal Democracy through three Presidential, and six Congressional, elections had now cut this option off. Henceforward, and regardless of their personal political beliefs, lawyers would use cases like *Darby* as paradigms<sup>38</sup> for legal discourse in the new regime. Like Justice Stone, they would look back to the Republican era in search of the great dissents by Holmes and Brandeis, and ignore the considered judgments of the majority who thought their opinions would control the future; like Justice Stone, they would be skeptical of the notion that property and contract were sacred preserves of constitutional freedom; like Justice Stone, they would reject any significant effort to restrict the powers of national majorities to solve the nation's economic and social problems. For all these purposes, *Darby* has operated as the functional equivalent of a formal amendment, serving as a foundational point for the evolution of the living constitution during the present era.

What is more, the processes of Presidential leadership that brought us *Darby* have also served as a founding precedent for subsequent effort at regime change. This was never clearer than during the Reagan years, when the New Right sought to revolutionize constitutional law through the very same techniques of transformative judicial appointment that Roosevelt used to such great effect. Robert Bork, like Felix Frankfurter, was nominated in the seventh year of a transformative Presidency, and for the same reasons. But when Roosevelt proposed this transformative appointment, there were sixty-nine Democrats in the Senate.<sup>39</sup> More important than the battle over Bork was the New Right's failure to sustain its control over the White House, and extend its authority to Capitol Hill. If Reagan had been

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38. For important clarifications of this much-abused term, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L.J. 1119, 1169-77 (1995) and Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105, 1114-1206 (1989).

39. See 3 Encyclopedia of the United States Congress 1557 (Donald C. Bacon et al. eds., 1995).



succeeded in 1988 by two terms of President Jack Kemp, Speaker Newt Gingrich, and Majority Leader Trent Lott, could there be any doubt that we would now be approaching a transformation of Rooseveltian proportion pursued by Rooseveltian means? Just as the Roosevelt Court unanimously repudiated the landmark opinions of the Republican era, so too the Scalia-Thomas majority would be preparing for its final assault on the landmarks of the preceding regime—and liberals like myself would already be mourning the departure of Justices O'Connor, Rehnquist, and Stevens who owed their appointments to the twilight years of the old regime before the People had decisively spoken in favor of the Reagan/Kemp Revolution. But things did not turn out that way. Justices Scalia and Thomas seem fated to play the role of Holmes and Brandeis—hoping against hope that their revolutionary dissents will be vindicated by some future movement of the American People.

There is much more to be said on all these matters, and I have done more than my share in a second volume of *We the People* that has been mailed off, at long last, to my publisher. But I have said enough to give some substance to my heartfelt hope that professors of fidelity in constitutional law will resist the call of Professor Tribe and Justice Thomas to consign the Roosevelt era to the junkheap of historical irrelevancy.

This is not because, as some critics have suggested,<sup>40</sup> that I wish to insulate my liberal political philosophy from the power of the People. First off, the constitutional principles of New Deal liberalism, even as supplemented by the Civil Rights Revolution, are a far cry from my own ideals for social justice in a liberal state;<sup>41</sup> and, in some important respects, impede their attainment. Even if I were a true believer in the creed elaborated by Franklin Delano Roosevelt and Martin Luther King, it should be clear enough that my work could be used to legitimate the root and branch repudiation of New Deal liberalism by some future Kemp-Gingrich-Lott trio.

This thought does not exactly inspire joy in my heart, but I am not in this business for the thrill of it. I am in it as a not-so-humble servant of the American People, who seeks to repay part of the great debt I have incurred as I rose out of a poor neighborhood in the Bronx to my present position of local eminence in New Haven. Given my interests and abilities, the best way I could discharge this debt is to invite Americans of very different political persuasions—and I mean very different—to join with me in an effort at seeing the bitter struggles for self-government of past generations as a common constitutional resource that might provide us with tools for understanding our own struggles over the Nation's future. By working together in this

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40. See, e.g., Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918 (1992) (reviewing Bruce Ackerman, *We the People: Foundations* (1991)).

41. Bruce A. Ackerman, *Social Justice in the Liberal State* (1980).

way, we might constitute ourselves as American citizens with a common understanding of our past and present that does not depend upon some narrow ideology or teleology. If this effort at convergent constitutional narrative were successful, it might provide us with a common compass as we struggle over the helm of the ship of state.

Of course, any efforts at narrative reconstruction are precarious. Even if they succeed for a time in crossing narrow partisan lines, they will be reworked in surprising ways by succeeding generations. Some of these refashionings may well put our own efforts to tell a compelling story in a very bad light.

There is nothing we can do to avoid such a fate. But at the very least, we can avoid visiting it upon others. At the moment, the generation of Franklin Delano Roosevelt is before the bar; soon enough, it will be the generation of Martin Luther King; but my children, your time will also come.